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Supreme Court of the United States

OCTOBER TERM, 1908.

No. [illegible]

JOHN H. SEXTON, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON APPEAL TO REVIEW FOR DEFENDANT IN ERROR.

[illegible]

Attorneys and Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 155.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF FOR DEFENDANTS IN ERROR.

The learned attorney general of the State of California, in the first statement of his brief, says:

"We shall argue that this court has no jurisdiction over "the questions or the subject-matter presented by the writ "of error herein, for that no Federal question properly "arises therein."

To which we reply that that question was submitted to this court on the motion to dismiss or affirm, and we feel sure that if this court had not thought it a Federal question it would promptly have granted that motion. In our brief

we have cited from two decisions of this court on that subject, and beg now to refer, in addition, to the case of *Houston vs. Moore*, 5 Wheat. (18 U. S.), 1, which was one very much like the one at bar. There the plaintiff in error (a member of the militia of the State of Pennsylvania) had been tried by court-martial under the law of that State and punished (by sentence to pay a fine). He brought that case into this court by writ of error, claiming, as we do, that the law of the State of Pennsylvania was in conflict with the Constitution and laws of the United States.

The court had no doubt that a Federal question was thereby presented, and heard and decided the case on its merits.

This case will be referred to later on.

First Point.

It is not proposed to waste time over the learned attorney general's FIRST POINT, which he so elaborately discusses (pp. 1–8, inclusive) in his brief.

As I read it, the comment of Prince Hal upon Falstaff's bill came into my mind.

It may freely be admitted that *if* the courts of the State of California had jurisdiction over the offense, for the alleged commission of which the plaintiff in error has been indicted, tried, convicted, and sentenced, then he has *not* been "deprived of his liberty by due process of law, contrary to "the provisions of sec. 1, art. XIV, of the Constitution of the "United States;" but, on the other hand, if the plaintiff in error *has* been tried, convicted, and sentenced by the courts of the State of California for an offense over which they had no jurisdiction, because such offense is one defined by the

laws of the United States, and over which the courts of the United States have *exclusive* jurisdiction (as plaintiff in error claims), then, as stated in our brief, "it follows as a corollary "that he HAS been deprived of his liberty without due pro- "cess of law, contrary to the provisions of sec. 1, art. XIV, "of the Constitution of the United States."

Second Point.

The learned attorney general's discussion of his second point (pages 9–12 down to the word "first" on page 12) of the police powers of the States and United States has no bearing whatever upon the sole question at issue in the case at bar.

It is undoubtedly true that there are many cases wherein the United States and the States have concurrent jurisdiction of the same offenses.

In citing from Mr. Justice Harlan's opinion, given in *Cross vs. The State of North Carolina* (132 U. S., 131), the attorney general should have gone a few lines further on and have added: "If it were competent for Congress to give exclusive "jurisdiction to the courts of the United States, &c., *it has* "*not done so. The false making* or forging of a promissory "note in a State purporting to be executed by an individual, "and made payable at a national bank, *is not a fraud upon the* "*United States, or an offense described in Rev'd Stat., § 5418.*"

Cross had been indicted and convicted for forging such a note.

The learned attorney general refers in terms of high commendation to the case, decided by the court of appeals of New York, of

People vs. Welch, 141 N. Y., 266.

That case maintains the sound propositions that "as to "crimes committed upon navigable waters within the State, "if they are such as existed at common law, and are defined "in the statutes of the State, while the Congress may exclude "the jurisdiction of the State courts, in the absence of such "exclusion that jurisdiction remains, although Congress "has vested jurisdiction over them in the Federal courts.

"No presumption that State authority is excluded arises "from the mere fact that Congress has legislated; there "must be express words of exclusion, or a manifest repug- "nancy in the exercise of State authority over the subject."

It cannot be pretended that the crimes under the internal revenue laws of the United States were "*crimes* at common law," or can be, and are or can be defined by the law of the State, or that the State had any jurisdiction over them at the time the Constitution was formed or *since;* and it is equally true that in cases where the United States has legislated over that subject, there is a "manifest repugnancy in "the exercise of State authority" over the same subject.

The attorney general in his brief "confesses and avoids" (or endeavors to avoid) our contention. He says that he does "not concede that the offense defined by the California "statute and the offense defined by the Federal statute are "one and the same offense, and that sec. 711 of the Revised "Statutes does not give the Federal courts exclusive juris- "diction, because § 5328 provides an exception to the opera- "tion of § 711." But does it? we ask.

Certainly if it does, then the States have jurisdiction to try and punish every offense denounced by title 70 of the Revised Statutes, from treason down.

That proves too much, and such a position cannot be maintained.

The case of *Houston vs. Moore* (in which the attorney general erroneously says Mr. Justice Story delivered the opinion of the court) is not in conflict with our contention here.

Mr. Justice Washington, in delivering the opinion of the majority of the court, there said: "As to State militia, the "power of the State governments to legislate on the subject "having existed prior to the formation of the Constitution, "and not having been prohibited by that instrument, it re- "mains with the States, *subordinate nevertheless to the para- "mount law of the General Government operating on the same "subject.*"

What the attorney general says (on pages 12, 13) about "charging," "accusing," and "informing" seems a mere play upon words.

A good pleader, in drawing an indictment, would, without doubt, use the words of the statute; but there can be little doubt that the statute would be satisfied if it were shown that a threat either to "accuse," "charge," or "inform" had been made.

In *U. S. vs. Simons*, 7 Fed. R., 709, Mr. Justice Brown (then district judge) merely decided between two or more persons as to which *was* the informer in that case.

Respectfully submitted.

JAMES PARKER,

Attorney and of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 155.

JOHN E. SEXTON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

And now comes the plaintiff in error in the above-entitled cause, and respectfully petitions this honorable court to allow him a rehearing in said cause upon the following grounds, viz:

I.

The court in its opinion, filed April 6, 1903, says (page 1): "The record now before us raises but a single question for "our consideration, and that is whether the State court upon "the facts alleged in the indictment had any jurisdiction "over the subject-matter."

"The plaintiff in error contends that the right of the "General Government to exercise jurisdiction over the "crime of which he is convicted is exclusive, and, there-

" fore, the State court had no right to try him upon the " indictment found in that court."

" The act (crime) of which the plaintiff in error is alleged " to have threatened to accuse Greenwald of committing is " mentioned in section 3392 of the Revised Statutes of the " United States, which makes it an offense to sell cigars " unless in new boxes, with the exception therein detailed."

II.

Section 3392 of the Revised Statutes of the United States is part of the " internal-revenue laws," and, after declaring that " all cigars shall be packed in boxes not before used for " that purpose, containing respectively twenty-five, fifty, one " hundred, two hundred and fifty, or five hundred cigars " each," it defines four acts as offenses, the commission of which shall subject the offender to fine for such offense of " not less than one hundred nor more than one thousand " dollars, and imprisonment not less than six months nor " more than two years."

1. Offering for sale, or delivering or offering to deliver " any cigars in any other form than in new boxes as above " described: or

2. " Who packs in any box any cigars in excess of the " number provided by law to be put in each box respect- " ively; or

3. " Who falsely brands any box; or

4. " Or affixes a stamp on any box denoting a less amount " of tax than that required by law."

III.

Another section of the Revised Statutes of the United States is as follows:

SEC. 5484. " Every person who shall receive any money " or other valuable thing under a threat of informing, or as

"a consideration for not informing against any violation of "any internal-revenue law, shall, on conviction thereof, be "punished by a fine not exceeding two thousand dollars, or "by imprisonment not exceeding *one* year, or both, at the "discretion of the court, with costs of prosecution."

IV.

The law of the State of California under which the plaintiff in error was tried and convicted is found in the following sections of the Penal Code of that State, viz:

"SEC. 518. Extortion is the obtaining of property from "another, with his consent, induced by a wrongful use of "force or fear, or *under color of official right.*

"SEC. 519. Fear such as will constitute extortion may be "induced by a threat either:

"1. * * *

"2. To accuse him or relative of his, or member of his "family, of any crime."

V.

The reasoning of the supreme court of California, in that part of its opinion cited by this court, is entirely fallacious.

That court says: "It makes no difference if that crime be "one solely triable in the Federal courts, for defendant *is not* "being *tried* for that crime."

This begs the question, because it is undeniable, as a comparison of the indictment with section 5484 will show, that the defendant *was* being tried for a crime defined and punishable under that section for "receiving money from Greenwald "*under a* threat of informing against him for having in vio- "lation of the laws of the United States of America, *sold and* "*delivered cigars in a form other than a new box not before used* "*for the purpose of packing cigars therein.*"

What I have underscored is the exact language of section 3392 of the Revised Statutes of the United States.

The case of "counterfeiting the *money* of the United States is mentioned by this court; and *Fox vs. Ohio*, 5 How., 410, is cited.

The words "*coin* of the United States" would confine this illustration to its exact limitation. The offense of which Malinda Fox had been convicted was that—*not* of counterfeiting—but of "*passing and uttering* a certain piece of false, "base, and counterfeit coin, forged and counterfeited to the "likeness and similitude of the good and legal silver *coin* "currently passing in the State of Ohio called a dollar."

Mr. Justice Daniel, in delivering the opinion, stated the issue thus (p. 432): "The only question with which it (this "court) can regularly deal in this case is the following, viz: "Whether that portion of the statute of Ohio, under which "the prosecution against the plaintiff has taken place, and "consequently whether the conviction and sentence founded "on the statute are inconsistent with or in contravention "with the Constitution of the United States or of any law of "the United States enacted in pursuance of the Constitu-"tion."

"We think (p. 433) it manifest that the language of the "Constitution, by its proper signification, is limited to the "facts, or the faculty in Congress of *coining and stamping* "the standard of value upon what the Government creates "or shall adopt, and of punishing the offense of producing a "false representation of what may have been so created or "adopted."

Thus *Fox vs. Ohio* decides, as stated in the *syllabus*, that "the power conferred upon Congress to provide for the "punishment of *counterfeiting* the securities and current coin "of the United States does not prevent a State from pass-"ing a law to punish the offense of *circulating counterfeit* "*coin*. The two offenses of counterfeiting the coin and

"passing counterfeit money are essentially different in their "characters."

The Congress at that time had passed no act to punish the uttering or circulating of counterfeit coin.

The principle decided in *Fox vs. Ohio* plainly has no application or bearing in the present case. If *Malinda Fox* had been indicted under the State law for *counterfeiting* the coin of the United States, the question then—that being a crime against the law of the United States—would have been as to the right of concurrent jurisdiction on the part of the State. The jurisdiction of the State would then have been saved by the twenty-sixth section of the act of Congress relating to counterfeiting offenses, which was in these words: "That nothing in this act contained shall be construed to "deprive the courts of the individual States of jurisdiction, "under the laws of the several States, over offenses made "punishable by this act."

But, as stated in my brief heretofore filed, *Fox vs. Ohio* has been reduced to a condition of "innocuous desuetude" by the repeal of all provisions of law saving to the States any jurisdiction over counterfeiting offenses, and the fact that since the passage of the act of January 16, 1877 (19 Stat. at L., 223) no offense of counterfeiting *or* passing counterfeit coin or national bank or United States notes has been cognizable under the laws of the States, and no such prosecutions have been had under State laws.

VI.

This court in its opinion in the present case says:

"It is true that the offense of extortion by threats to "accuse a person of a violation of any part of the internal-"revenue law, is made a crime by virtue of the Federal "statute. *If there were no statute in regard to the sale of cigars "other than in new boxes*, as provided for in section 3392 of "the Revised Statutes, a threat to accuse a person of doing

"such an act *would not be a threat to accuse him of any crime*, "and hence would not be punishable. As the crime *itself* "*exists only by virtue of the above section*, and as the threat to "accuse one of the commission of such an act is also pro- "vided for by another section, there might be some plausibil- "ity in the contention of the plaintiff in error that, under "the Federal statutes above cited, jurisdiction of the United "States courts was exclusive.

"We do not decide that such contention is well or ill "founded; nor do we express an opinion thereon, because "we do not regard it as necessary for our decision in this "case.

"The section which makes it an offense to extort money "under a threat of informing in regard to an alleged viola- "tion of any internal-revenue law (sec. 5484) is contained in "title 70, denominated 'Crimes' in the United States Re- "vised Statutes, and, in that title, is found another section "which provides that—

"SEC. 5328. 'Nothing in this title shall be held to take "away or impair the jurisdiction of the courts of the several "States under the laws thereof.'

"Assuming that, but for this section, the State court would "be without jurisdiction, we are of the opinion that it takes "the case out of the provisions of sec. 629, sub. 20, and sec. "711.

"Section 5328 must be construed as creating an exception "to the general rule declared in these other sections in re- "gard to the jurisdiction of the Federal courts."

The court then cites the case of *People vs. Welch* (141 N. Y., 266–277), and justly styles the opinion in that case as "very well reasoned."

We accept this characterization of that case in its fullest sense, but we very humbly doubt the correctness of the other statement that the court of appeals of New York placed the same construction upon section 5328 now given by this court.

We do this with extremely reluctant diffidence, in view of the fact that the learned justice who delivered the opinion of this court in the present case was a member of the court of appeals of New York when *People vs. Welch* was unanimously decided.

The languge of section 5328 of the Revised Statutes of the United States is, "Nothing in this title, 70, shall be held to "*take away or impair* the jurisdiction of the courts of the "several States," &c.

Of course, that means any jurisdiction such State courts had *at the time that section was enacted.* Of course, also, it cannot rightfully be construed to give authority to the States to assume jurisdiction over offenses against laws that might *thereafter* be enacted by the United States. These propositions are sustained in *People vs. Welch. Welch's* offense was manslaughter, committed by him by having "feloniously and willfully propelled and forced a steam tugboat against a yacht and thereby causing the death of one Jackson by drowning."

This had also been declared by Congress to be an offense against the laws of the United States.

Chief Justice Andrews, while conceding the jurisdiction of the United States to punish such an act, committed even *infra corpus comitatus*, maintained the jurisdiction of the State by the following argument, viz.:

"The State, in punishing the defendant, is not enforcing "a statute of the United States. It is enforcing its own laws, "*which had an existence coeval with the formation of the State* "*constitution.* The crime of which the defendant was con- "victed was primarily a crime against the peace and good "order of the *State.* It was only a crime against the United "States because Congress, in the interest of navigation, had "seen fit to enact a law making one species of homicide "when committed by an officer, pilot, etc., manslaughter, "punishable in the courts of the United States."

"There is nothing in the enactment itself which makes "the jurisdiction exclusive. The jurisdiction of the United "States courts is *not exclusive* unless there is found elsewhere "in the provisions of Congress provisions of clear and un- "mistakable import *taking away* the jurisdiction of the courts "of the State."

We think section 5328 must be construed as exempting from the "operation of section 711 the cases specified in "title 70, which *were also offenses punishable under* the laws "of the United States."

"Section 5328 may perhaps be construed as confining the "concurrent jurisdiction of the State courts of offenses "specified in title 70 to such offenses as were such *under the* "*laws of the States existing when that section was enacted*, leav- "ing the section (711) to operate to prevent future legisla- "tion by the States concerning the crimes mentioned in "that title not before cognizable under State laws."

VII.

To apply these sound principles thus declared by the court of appeals of New York in the present case, we may state:

1. That section 5328 was adopted originally in 1795. The section 5484, of title 70, was adopted July 13, 1866. Can it with any propriety be said that section 5328 applies (without special enactment to that effect) to an offense against the internal-revenue laws (which laws were not even in contemplation, much less in existence, at that time and for more than seventy years thereafter), and which was passed by Congress to secure protection of its internal-revenue system, and concerning which the States never had and have not now any cognizance whatever?

VIII.

By section 3169 of the Revised Statutes of the United States it is provided that "any officer or agent appointed and acting under the authority of any revenue law of the United States—

"*First.* Who is guilty of any extortion or willful oppression "*under color of law*, or

"*Tenth.* Who demands or accepts, &c., for the compromise "or settlement for any violation or alleged violation of law, "&c., shall be held to be guilty of a misdemeanor, and fined, "&c., and imprisoned."

The doing of all this would undoubtedly fall under the ban of this California law, which declares that "extortion is "the obtaining of property from another * * * *under* "*color of official right.*"

Does this court intend by its decision to hold, as there can be no doubt it would hold, that an *officer* who obtains property from another "wrongfully by *color* of *official right*" is *not* amenable to the law of California, but that a person not an officer *is* amenable under the same law for doing the same thing, simply because the offense of the latter is denounced by a section which is part of title 70, which title contains section 5328, while the former is not?

IX.

This court certainly cannot intend to commit itself to any such inconsistency.

"It is said that hard cases make bad law."

The consideration that, if this decision of the courts of California is reversed by this court, the plaintiff in error will escape punishment for the offense of which he was con-

victed may not be without weight, but, on the other hand, it is to be remembered that the supreme court of California said, in its opinion, that "the evidence tending to support "the conviction in this case is very weak," and that owing to the peculiar "circumstances of this case and the character "of the evidence relied upon to support the verdict, we think "the *law would* have been well satisfied with a judgment "finding the defendant guilty of a misdemeanor."

It is of vastly greater importance that the exclusive jurisdiction of the United States over crimes denounced by its own laws should be maintained against invasions by the States than that a doubtful jurisdiction of the State should be maintained in this case.

It will place the citizen in a hard plight if, in cases wherein the United States authorities fail for any reason to regard a certain transaction as a violation of its laws, the State should be allowed to take the matter up and by the use of local or other considerations convict and punish more heavily than the United States law permits. (The California law permits *two* years imprisonment, the United States law only *one* year.)

If this decision by this court is to stand there will be nothing to prevent a man who has been punished under the law of the United States from being brought up (and punished more severely) under the law of the State for the same offense, and *vice versa*, which would, of course, be intolerable.

The framers of the Constitution foresaw this and provided against it by that clause which says:

"This Constitution and the laws * * * made in pur-"suance thereof shall be the supreme law of the land, * * * "anything in the Constitution or laws of any State to the con-"trary notwithstanding."

And Congress, by its enactments in 1795, in sections 629 and 711, while also careful to preserve the jurisdiction of the States, *which they had before such laws* were adopted, has been

careful to maintain this necessary attribute of supreme sovereignty.

The condition of affairs to which the decision of this court in the present case would lead us was well set forth in this court in the case of *Ableman vs. Booth* (21 How., 506, L. ed., vol. 16, p. 169), where the Chief Justice, in delivering the unanimous opinion of the court, said:

"If the supreme court of Wisconsin possessed the power "it has exercised in relation to the act of Congress in ques- "tion, it necessarily follows that they must have the same "judicial authority in relation to any other law of the United "States; and, consequently their supervising and controlling "power, would embrace the whole criminal code of the "United States, and *extend to offenses against our revenue laws*, "or any other law intended to guard the General Govern- "ment from fraud or violence. And it would embrace all "crimes, from the highest to the lowest, including felonies "which are punished with death, as well as misdemeanors "which are punished by imprisonment. And, moreover, if "the power is possessed by the supreme court of the State of "Wisconsin, it must belong equally to every other State in "the Union when the prisoner is within its territorial limits; "and it is very certain that the State courts would not always "agree in opinion; and it would often happen, that an act "which was admitted to be an offense, and justly punished "in one State, would be regarded as innocent, and, indeed, "as praiseworthy in another."

Suppose that, in the present case, the plaintiff in error had been convicted in the State courts and imprisoned, and that he had been a month or so later indicted in the United States court for this same offense; that, armed with criminal process, the marshal of the United States had demanded the prisoner from the warden of the State penitentiary; that he had been refused. Can there be any doubt that the United States authorities would have been justified in taking him,

and that this court, if such a case were before it, would unhesitatingly maintain the jurisdiction of the courts of the United States over that of the State courts—in other words, "the *exclusive jurisdiction* of the United States?" Can it make, ought it to make, any difference because the United States does not choose to exercise its right in the matter? Ought the unfortunate citizen to be made into a sort of "legal shuttlecock," to be knocked about between these conflicting jurisdictions?

X.

For these and other considerations, your petitioner humbly prays this honorable court to grant this his petition for a rehearing in this cause.

JOHN E. SEXTON,
Plaintiff in Error,
By JAMES PARKER, *Counsel.*

The undersigned, an attorney and counsellor of this honorable court and counsel for the petitioner, John E. Sexton, plaintiff in error in the above-stated cause, hereby certifies that in his opinion the grounds set forth in the foregoing petition for rehearing of said cause are valid and sufficient to justify and require such rehearing, and that the same is not made for delay.

JAMES PARKER,
Counsel for John E. Sexton,
Plaintiff in Error, Petitioner.

Dated MAY 20, 1903.